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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 635

FEDERAL TRADE COMMISSION,
Petitioner,
v.
TEXACO INC. AND THE B. F. GOODRICH COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals is reported at 336 F. 2d 754 and is printed as an Appendix of the Petition (1a-27a).[1] The first opinion of the Federal Trade Commission is reported at 58 F. T. C. 1176. The Commission's

* Although petitioner has grouped both Texaco and Goodrich together in the title of its petition for a writ of certiorari, there were two separate cases before the District of Columbia Court of Appeals, *Texaco Inc.* v. *FTC*, No. 17915, and *The B. F. Goodrich Co.* v. *FTC.*, No. 17923, which were briefed and argued separately by respondents.

[1] Page numbers followed by the letter "a" refer to the Appendix of the Petition.

second opinion is not yet reported but is reproduced in the printed Joint Appendix ("JA") filed in this Court at JA 302-03. The Initial Decision ("I. D.") and the revised Initial Decision ("Rev. I. D.") of the Examiner are reproduced at JA 153-71 and JA 200-33, respectively.

Jurisdiction

Petitioner invokes this Court's jurisdiction under 28 U. S. C. §1254 (1). The judgment of the Court of Appeals was entered on July 30, 1964.

Questions Presented

The question presented by the petition is improperly framed for two reasons: (1) It ignores a series of threshold procedural questions, peculiar to this case, which must be resolved before the merits can be reached; and (2) Even on the merits, it fails to pose the question accurately, since the merits raise only issues of fact.

Petitioner concedes that because of the refusal of Chairman Dixon of the Federal Trade Commission to disqualify himself for having prejudged the case, this Court cannot sustain the Commission's order but can merely remand the case to the Commission for reconsideration without the Chairman's participation (Petition, p. 11).

But petitioner has not fully articulated why the Court of Appeals ordered that the complaint be dismissed and refused to authorize further remand proceedings. As the Court below concluded, the Commission's "efforts in this case—fruitless after a dozen years—have exceeded permissible limits and have had unreasonably harassing and oppressive effects upon the companies under attack" (17a-18a). Hence the preliminary question for decision

is this: Was this already unduly protracted case properly terminated because the Commission successively denied respondents due process and violated the Administrative Procedure Act:

(1) by failing to proceed with reasonable dispatch in the conduct of its proceedings and by fending off threatened judicial intervention to halt the Commission's 1961 remand by misrepresenting the need for additional evidence which it had no reason to believe existed and which was never forthcoming;

(2) by refusing to disqualify Chairman Dixon for prejudging the case in a speech, made while the proceeding was pending before the Hearing Examiner, in which the Chairman clearly indicated to a group of service station dealers that he had already decided that respondents had in fact violated the law as charged—thereby tainting the Commission's second decision and order; and

(3) by failing to explain, by adequate findings, conclusions and reasons, the basis for its determination on respondents' second appeal (after the remand) that they had violated Section 5 of the Federal Trade Commission Act, when, on the prior appeal (before the remand), the Commission had found no such violation on precisely the same factual record.

Only if the foregoing issues were to be decided against respondents would it become appropriate to consider the merits. And then, the real questions for decision would be purely factual, namely:

(1) Whether the Court of Appeals erred in holding that the evidence in the record did not support the Commission's conclusion that Texaco had *controlling* economic power over its dealers so as to cause them to buy substantial quantities of Goodrich TBA *without* the use of coercive tactics; and, if so,

(2) Whether the record lacks sufficient evidence of adverse competitive effects, as the Commission itself held prior to its tainted second decision;

Statement of the Case

The TBA sales commission agreement under attack in this proceeding was entered into by respondents Texaco and Goodrich in 1940.[2] The Federal Trade Commission began to investigate this arrangement, along with sales agreements between other oil and rubber companies, at least as early as 1949. These investigations culminated on January 11, 1956 in three similar complaints, one against Texaco and Goodrich, another against The Goodyear Tire & Rubber Co. and The Atlantic Refining Co. (hereinafter *"Atlantic-Goodyear"*), and a third against The Firestone Tire & Rubber Co. and Shell Oil Co. (hereinafter *"Shell-Firestone"*).

The complaint in this case charged that Texaco's agreement with Goodrich constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act because it had adverse competitive effects upon other TBA suppliers at the manufacturing, wholesale and retail levels.[3] The essence of the charge, as it developed

[2] In that same year, Texaco also entered into a similar agreement with The Firestone Tire & Rubber Co.

[3] The complaint also attacked Texaco's sales commission agreement with Firestone, as well as similar agreements between Goodrich and five other oil companies.

before the Hearing Examiner, was that competing TBA sellers had been foreclosed from the patronage of Texaco retail dealers.

1. The Examiner's first Initial Decision

On October 23, 1959, some three and a half years after the complaint was filed and after two years of hearings, the Examiner handed down his first Initial Decision. Finding none of the alleged adverse effects on competition, he rejected the underlying theory of the complaint. Specifically, he refused to find that "[c]ompeting manufacturers and/or distributors, wholesalers or other vendors of TBA products are foreclosed from a substantial portion of the TBA business of the Texaco petroleum outlet market as a result of the override agreements between Texaco and the rubber companies" (JA 152). He also refused to find that "Texaco, by virtue of the relationship, contractual or otherwise, existing between it and station operators, consignees and distributors, handling its petroleum products, exercises control or influence over such outlets, thereby depriving them of freedom of choice as to their source of supply of TBA products and causing them to buy the TBA products of the respective rubber companies" (*Ibid.*). He found that neither the sales commission agreement between Texaco and Goodrich, nor Texaco's contracts with its dealers or distributors, contain any terms requiring them to purchase Goodrich TBA; that the housekeeping provisions of the Texaco leases were neither unreasonable nor oppressive; that their renewal and cancellation provisions were in conformity with those ordinarily appearing in property leases; and that no inference could be drawn from such contractual relationship that Texaco has sufficient control over its deal-

ers to force them to purchase only sponsored TBA (I. D., JA 168-69).

In light of these findings, the Examiner upheld the sales commission agreements. But he avoided dismissing the complaint against Texaco by a peripheral finding of "coercion" based on the testimony of five ex-dealer witnesses.[4] On this flimsy basis, he directed Texaco to cease and desist from overt acts of coercion.[5]

The Examiner simultaneously enjoined coercion in the other two TBA cases (*Atlantic-Goodyear* and *Shell-Firestone*).

2. The first Commission opinion

On March 9, 1961, the Commission rendered its separate decisions in each of the three TBA cases. In both the *Atlantic-Goodyear* and *Shell-Firestone* proceedings, it found coercion, unlawful tie-ins, and adverse competitive effects resulting from the TBA sales commission agreements;[6] and it prohibited the agreements. In sharp contradistinction, in the *Texaco-Goodrich* case the Commission did not find coercion,[7] tie-ins or anticompetitive effects; but instead

[4] The Court of Appeals termed this "a rather extraordinary conclusion in view of the fact that not one of Texaco's more than 38,000 dealers was called to testify before the examiner in support of the complaint. The examiner based the statement on the testimony of five former Texaco dealers who said they had been coerced, although five other former dealers and 54 active dealers called by Texaco said they had never been coerced or influenced in any way as to Goodrich TBA" (4a).

[5] Not finding that Goodrich participated in such "coercion," the Examiner dismissed the complaint against it (I. D., JA 171).

[6] The Commission's opinions in *Atlantic-Goodyear* and in *Shell-Firestone* are reported at 58 F. T. C. 309 and 58 F. T. C. 371, respectively.

[7] As the court below noted, "the remanding Commission apparently did not regard [the] meager proof [of coercion] as convincing; for it expressly discarded it as a basis of decision . . ." (13a). See also note 4, *supra*.

of dismissing the complaint, it remanded the proceeding to the Examiner for the reception of additional evidence of competitive effects.

Texaco, the Commission asserted, "has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics" (58 F. T. C. at 1178). This "economic power" was deemed a "key fact" "existing independently of any particular method of distributing TBA which Texaco may use." Continuing, the Commission reasoned: "The determination of whether Texaco's exercise of such economic power in favor of Firestone and [Goodrich] under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon *the competitive effects* of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the use of overt coercive tactics, or by more subtle, but equally effective, means" (58 F. T. C. at 1178-79; emphasis in original).

While not specifying what it meant by "competitive effects," the Commission made crystal clear that no such effects had been demonstrated in this proceeding:

> "[T]he record in this case does not contain sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents" (58 F. T. C. at 1183).

It concluded:

> ". . . [T]his case must be remanded in order that market data may be introduced to show the competi-

> tive effects of Texaco's sales commission agreements with Goodrich and Firestone upon competing suppliers of tires, batteries and accessories at the manufacturing, wholesale and retail levels" (58 F. T. C. at 1179).

There was no such problem in the other two TBA cases decided the same day. In both *Atlantic-Goodyear* and *Shell-Firestone,* besides finding that the oil companies had engaged in coercion and unlawful tying arrangements, the Commission specifically found the existence of anticompetitive effects at the manufacturing, wholesale and retail levels.[8]

3. Texaco's effort to bar the remand

As soon as attempts were made to implement the remand order, Texaco and Goodrich brought suit against the Commission in the District Court for the District of Columbia seeking a declaratory judgment that the remand was illegal and an injunction against further proceedings. All three TBA cases had been investigated by the same members of the Commission staff; the same trial counsel represented the Commission in the *Texaco-Goodrich* and *Atlantic-Goodyear* cases; the issue of competitive effects had been crucial from the very inception of the case; and Commission counsel had never suggested that any additional evidence on that issue existed. Texaco and Goodrich, therefore, argued that the deficiency in the record was neither inadvertent nor remediable, and that the Commission had failed to proceed with reasonable dispatch as required by law.

In resisting the Texaco and Goodrich application for judicial relief, Commission counsel represented to the Dis-

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[8] The effects found by the Seventh Circuit in *Atlantic-Goodyear,* none of which has ever been found in the *Texaco-Goodrich* case, are set out in the text *infra* at pp. 24-25.

trict Court that the agency "needed additional evidence in order to decide the issues presented."[9] Underscoring the necessity for such evidence, although not indicating where it might be found, counsel urged the District Court not to prevent the Commission "from obtaining evidence which in its opinion is *necessary* to a final disposition of the proceeding on the merits."[10] At the same time, counsel assured the Court that the remand was not to be a retrial of what was already in the record:

> "On its face, the Commission's opinion shows that its remand *is not seeking a retrial* of matters already tried but rather envisions supplementary *evidence* on what it considered to be significant *facts* in any assessment of the competitive effects of the sales commission agreements, namely, the effects upon competing TBA suppliers stemming solely from this method of distribution. . . . Here, the remand involves developing *additional evidence* on the crucial issue, one that will be dispositive of the proceeding; . . . Here, the remand involves a *highly complex and complicated question* in which it is sought to determine the probable competitive effects of the sales commission method of distributing TBA. . . ."[11]

The District Court specifically recognized that the remand order had been issued because the Commission had "found the evidence before it inadequate to show a viola-

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[9] *Texaco Inc.* v. *FTC*, Civil No. 2219-61, Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 26, served August 28, 1961.

[10] *Texaco Inc.* v. *FTC*, Civil No. 2219-61, Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, p. 2, filed April 30, 1962 (Emphasis supplied).

[11] *Id.* at pp. 21, 17 (Emphasis supplied).

tion of Section 5 of the Federal Trade Commission Act.'"[12] But on the strength of the Commission's solemn representations, the Court refused the injunction.[13] It ruled, however, that Texaco and Goodrich would be entitled to relief if the Commission failed to proceed with reasonable dispatch to conclude the proceeding, and if all further evidence were not heard and the decision of the Examiner on remand were not filed by October 2, 1962.[14]

4. The sham remand hearings

The remand hearings lasted 2½ days and closed on July 19, 1962, without a scrap of additional evidence having been adduced by the Commission.[15] Instead of offering evidence, Commission counsel induced the Examiner to take official notice of certain matters in the Commission's opinion in the *Shell-Firestone* case—despite the statement in that very opinion, as well as in *Atlantic-Goodyear*, that findings and conclusions in each of the three TBA cases had to be based solely on its own record (58 F. T. C. at 419-20; 58 F. T. C.

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[12] *Texaco Inc.* v. *FTC*, Civil No. 2219-61, 7 F. T. C. Stat. & Dec. 488, 491 (1962 Supp.) (D. D. C. June 19, 1962).

[13] *Texaco Inc.* v. *FTC*, Civil No. 2219-61, 7 F. T. C. Stat. & Dec. 492 (1962 Supp.) (D. D. C. June 20, 1962).

[14] *Texaco Inc.* v. *FTC*, Civil No. 2219-61, 7 F. T. C. Stat. & Dec. 488 (1962 Supp.) (D. D. C. June 19, 1962). Subsequent attempts to obtain temporary injunctive relief from the Court of Appeals and from this Court were unsuccessful. In opposing these further applications, Commission counsel made essentially the same representations that had been made to the District Court as to the necessity for the remand to develop indispensable additional evidence. After the remand hearings had closed on July 19, 1962, Texaco and Goodrich agreed to the dismissal of all pending judicial proceedings without prejudice.

[15] Hence it is hardly appropriate to argue, as does petitioner, that the Examiner issued a revised initial decision "[a]fter receiving further evidence" (Petition, p. 8).

at 368). The Examiner brushed aside Texaco's plea that the doctrine of official notice did not permit shuffling evidence or findings from case to case, thereby cutting off the right of cross examination and shifting the burden of proof. Subsequently, the Commission upheld Texaco on this point by eliminating from consideration anything adduced at the remand and striking so much of the Examiner's new findings and conclusions as were based thereon (JA 302-03). In the final analysis, therefore, the remand hearings, although supposedly indispensable to the disposition of this case, played no part whatever in the Commission's ultimate determination.

5. The revised Initial Decision

The Examiner had been authorized only to receive "further evidence concerning the competitive effects of the respondents' practices" and to indicate what changes, if any, he wished to make in his first Initial Decision in light of such evidence (JA 174). Nevertheless, on September 24, 1962, without any additional evidence from Commission counsel, he filed a revised Initial Decision in which he outlawed respondents' sales commission agreements. The Examiner performed this complete about-face simply by dropping several of his previous conclusions, parroting the Commission's assertion concerning Texaco's "economic power," and substituting the undocumented conclusion that the sales commission arrangement "gives Goodrich an unfair competitive advantage over its smaller competitors in the sale of TBA products to Texaco outlets and other oil company outlets" (Rev. I. D., JA 230). None of the competitive effects which the Commission had deemed dispositive in the other two TBA cases were found by the Examiner.

6. The second Commission opinion

On April 15, 1963 the Commission, without a single new fact and without any intervening change in legal doctrine, handed down a 3-1 *per curiam* decision holding precisely the opposite of what it had held on March 9, 1961. The majority consisted of three new Commissioners, including Chairman Dixon.[16] Looking only to the pre-remand record, it sustained the Examiner's freshly minted conclusion that the sales commission agreements were unlawful. Without reviewing any evidence in its three paragraph opinion, the Commission summarily ruled that the old record "amply supports the conclusions and the order of the hearing examiner" (JA 302).

For elucidation of how a record deemed inadequate in 1961 could support an order in 1963, the Commission contented itself with referring to its opinions in the two other TBA cases: "The legal principles relevant to this decision need not be reexamined here because they are set forth at length in the opinions of the Commission in *Goodyear Tire & Rubber Co., et al.*, Docket 6486, March 9, 1961, and *Firestone Tire & Rubber Co., et al.*, Docket 6487, March 9, 1961" (*Ibid.*). But the Commission ignored entirely its own decision handed down on the same day in the present case. There, applying the precise principles enunciated simultaneously in *Atlantic-Goodyear and Shell-Firestone*, it had found the evidence of record in *this* case insufficient to support the complaint.

Commissioner Anderson, who alone had participated in the earlier decision, did not concur in the subsequent one "for the reason that the command of the remand order of

[16] Only four members of the Commission participated in the 1963 decision because Commissioner MacIntyre, who at one time had direct charge within the Commission of the investigation which culminated in this proceeding, voluntarily withdrew.

March 9, 1961, has not been met and complied with" (JA 303).

7. The unsuccessful effort to disqualify Chairman Dixon for bias prior to argument of the second appeal before the Commission

On July 25, 1961 Chairman Dixon, shortly after his appointment to the Commission and *while this proceeding was pending on remand before the Examiner,* addressed the National Congress of Petroleum Retailers, Inc., a trade association of retail service station operators. Only four months earlier, and prior to Chairman Dixon's appointment, the Commission had declared itself unable, on the record evidence, to find Texaco's sales commission agreements illegal. Moreover, on that same evidence the Examiner in 1959 had found the agreements lawful. Nevertheless, in speaking to the gasoline dealers, Chairman Dixon not only assumed that Texaco's TBA agreements were unlawful but virtually committed the Commission to put an end to them.[17]

In view of this speech, Texaco moved prior to argument that Chairman Dixon withdraw from participation in the 1963 appeal to the Commission; alternatively, Texaco requested the Commission to disqualify him. The Chairman, professing an open mind, refused to step down; and the Commission, considering the matter as primarily for the determination of the individual Commissioner, declined to intercede.

8. The decision of the Court of Appeals

The Court of Appeals was unanimous in its judgment that "Chairman Dixon's participation in the hearing

[17] Pertinent extracts of this speech are quoted in the opinion of the Court of Appeals (8a-9a).

amounted in the circumstances to a denial of due process which invalidated the order under review," since "[h]is Denver speech, made before the matter was submitted to the Commission but while it was before the examiner, plainly reveals that he had already concluded that Texaco and Goodrich were violating the Act, and that he would protect the petroleum retailers from such abuses" (10a-11a).

With respect to the Commission's theory of illegality, a majority of the Court further held that there had been a failure of proof. Noting that, under the Commission's view of the law, the first essential element of a Section 5 violation was Texaco's possession and exercise of controlling economic power over its dealers without the use of coercion, Judges Miller and Burger ruled that the Commission's finding of the requisite power was without a substantial evidentiary basis:

> ". . . neither Commission referred to any evidence in support of this finding, and neither made any finding of fact which would sustain a conclusion that Texaco had such economic power over its dealers, and we are unable to see substantial evidence on the record as a whole to sustain that conclusion" (14a).

The precise holding was this:

> "We hold, therefore, that the Commission erred in concluding that Texaco has sufficient economic power over its dealers, without the use of coercive tactics, to cause them to buy substantial quantities of Goodrich TBA. We have already noted that the Commission did not find coercive tactics had been used, and that the record as a whole demonstrates the contrary" (15a).

In view of this failure of proof on the threshold question of controlling economic power, the Court of Appeals found it superfluous to proceed to the second critical issue, namely, competitive effects.

In light of the Commission's "fruitless" efforts after a dozen years of investigation and litigation, "including the remand for additional evidence said to have been necessary but never used," and the concomitant harassment of respondents by such "undue protraction of the administrative process," the majority ordered "that this long drawn out proceeding should now be terminated" (17a-18a).

Judge Washington, though doubting the majority's appraisal of the insufficiency of the evidence, would not have reached the merits since he agreed that the Commission's order could not stand because Chairman Dixon's participation in the case had deprived respondents of a fair hearing. He also found the order deficient because the Commission had failed to explain the basis for its decision: "The mere citation of earlier opinions does not provide a sufficient basis to understand and evaluate the Commission's decision on the facts of this case. *There are a variety of facts and findings relied on by the Commission in the Goodyear and Firestone cases which cannot be readily assumed here*" (21a; emphasis supplied). Judge Washington, accordingly, would have directed the Commission "to perform its function of articulating the facts and spelling out its theories" (23a), but without Chairman Dixon participating.

ARGUMENT

I.

Because of the Commission's unreasonably harassing, unfair and oppressive tactics, and its undue prolongation of this case, the court below was fully justified in dismissing the complaint and preventing further protraction of the proceedings by another remand.

This case exemplifies the administrative process at its very worst. It is unique in its plethora of abuses. Certainly nothing of the kind occurred in the *Atlantic-Goodyear* or *Shell-Firestone* cases. Nor does petitioner contend that there is any conflict in this respect between the decisions of the court below and the Seventh Circuit. It simply ignores the point.

Petitioner's silence is understandable. The conduct of the Commission in this case repeatedly violated the Administrative Procedure Act and deprived respondents of due process. In its zeal to find respondents "guilty" as charged despite the embarrassing lack of supporting evidence, the Commission: (1) first subjected respondents to sham remand hearings, warding off judicial intervention by misrepresenting that additional proof of competitive effects would be forthcoming and that there would be no "retrial of matters already tried"; (2) then it refused to disqualify its Chairman on respondents' second appeal, although it was apparent from his inflammatory speech to the National Congress of Petroleum Retailers that he had prejudged respondents' "guilt"; (3) next, on the identical record that the Commission had previously held insufficient to outlaw the sales commission agreement, it summarily invalidated

the agreement without even deigning to vouchsafe an explanation for the reversal of its position; (4) and, now, to compound its wrongs, it has the hardihood to ask for a license to continue its prolonged attack against respondents by subjecting them to still another remand.

The court below, probably the most experienced in the country in reviewing the action of administrative agencies, recognized that "the Commission must be allowed considerable leeway in developing a record . . . (17a)." But it also recognized that the Commission's latitude is not unlimited: ". . . its efforts in this case—fruitless after a dozen years—have exceeded permissible limits and have had unreasonably harassing and oppressive effects upon the companies under attack" (17a-18a).

It was high time for the judiciary to call a halt to such harassment and oppression, and the Court of Appeals was eminently justified in dismissing the stale complaint and terminating "this long drawn out proceeding . . . now" (18a).

In electing not to seek review of the disqualification of Chairman Dixon, petitioner concedes that "[T]he ruling turns largely upon the facts of the particular case", and that "the issue does not appear of sufficient general importance to warrant asking this Court to review it" (Petition, p. 11). The same concession applies with equal force to the ruling—based upon a unique succession of improprieties—that the administrative process has been unduly protracted here in violation of respondents' rights. Whether under the peculiar facts of this case the proceeding should end now (as the Court of Appeals decided), or whether the Commission should be given a third bite at the apple (as petitioner urges), is clearly not the type of question which this Court should be called upon to decide.

II.

On the merits, there is no conflict with the Seventh Circuit since its decision in the *Atlantic-Goodyear* case rested upon a dramatically different factual record, which the Commission itself explicitly recognized in its 1961 decision.

Petitioner's argument that the decision below conflicts "in basic approach and rationale" with the Seventh Circuit's ruling in *Atlantic-Goodyear* wholly ignores the critical and pervasive differences in the facts of the two cases—differences which were once vital enough for the Commission itself to reach diametrically opposite determinations in the two proceedings. The passage of time has not eradicated their factual differences. The two cases are still poles apart.

A. The issue of controlling economic power

Petitioner contends that the District of Columbia and Seventh Circuits do not see eye to eye with respect to whether "a major oil company" has controlling economic power over its dealers—as if the existence of such power were a question of law. But neither Court of Appeals treated the question as anything other than one of fact—and inevitably so.

The Seventh Circuit did not hold, as petitioner implies (Petition, p. 13), that Atlantic had controlling economic power over its dealers merely because of its lease and equipment loan contract with their short term and cancellation provisions. Its holding on the issue of power was predicated on "[t]he totality of facts surrounding the relationship between" Atlantic and its dealers (331 F. 2d at 401). By the same token, when the District of Columbia Cir-

cuit stated "we find no basis in the record for the Commission's conclusion that Texaco has controlling economic power over its dealers" (15a), its statement was based on the record as a whole. Contrary to the implication of the petition (p. 13), the Court of Appeals did not simply say that "[t]he contracts with the dealers do not give rise to [controlling economic power]" (15a). For it immediately added: "and it is the announced policy of Texaco to respect the independence of its dealers; *as the evidence overwhelmingly shows*, its practice has followed its policy" (*ibid.*; emphasis supplied).

Nor is there a conflict because the Seventh Circuit concluded, in the context of the record before it, that Atlantic's "recommendation [to its dealers] is tantamount to command" (331 F. 2d at 401), whereas the court below found, on an entirely different record, that Texaco dealers "are quite free to accept or reject the recommendation, and to handle a different line if they think it would be more acceptable to their customers" (16a-17a).

There is no mystery about why the two Courts of Appeals reached their respective conclusions on the issue of controlling economic power. These are just a few of the pertinent factual differences in the two cases:

(1) Both the Commission and the Seventh Circuit found that Atlantic had coerced its dealers, that such coercion resulted in implied tie-in agreements (by conditioning the sale of gasoline and the leasing of stations on the purchase of Goodyear TBA), and that such tie-ins were unlawful under *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958).[18] Atlantic, indeed, is no longer contesting

[18] The Examiner in *Atlantic-Goodyear* specifically found that "leases have, on occasion, been cancelled because of TBA practices involving the purchase or display of non-sponsored TBA products" (58 F. T. C. at 321).

the finding of coercion in its petition for certiorari in this Court to review the Seventh Circuit's decision (Petition, pp. 6-7). Manifestly, the determination that Atlantic's dealers were subjected to tie-ins supported a finding of controlling economic power. As Mr. Justice Black observed in *Northern Pacific*: "The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints" (356 U. S. at 7-8).

There is no such counterpart in the present case. There was no coercion,[19] and the Commission at no time found that Texaco had entered into any tying agreements with its dealers—whether written or oral, express or implied. Neither did the Commission suggest that this case (unlike *Atlantic-Goodyear*) could be disposed of under *Northern Pacific*. Completely missing from the Commission's opinions here is the statement made by it in *Atlantic-Goodyear* (and which the Seventh Circuit adopted) that the challenged arrangement is "a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)."[20]

(2) When Atlantic originally instituted its sales commission agreements with Goodyear and Firestone, a survey of its dealers showed that 67% preferred Lee tires and 79% preferred Exide batteries over competing brands; yet within the space of nine months Atlantic was able to induce almost all its dealers to switch to Goodyear and Firestone products (331 F. 2d at 398)—a transformation which the Seventh Circuit regarded as a convincing display of power and its effect upon the dealers.

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[19] See text at p. 14 and notes 4 and 7, *supra*.

[20] 58 F. T. C. at 367; see 331 F. 2d at 402.

Again, there is absolutely no parallel here. Far from embracing sponsored TBA, the overwhelming majority of Texaco dealers do not purchase either Goodrich or Firestone products. *Only some 30% of all Texaco stations regularly buy any Goodrich or Firestone tires, and only 20% buy the batteries and accessories of these rubber companies* (JAX 177-180).[21] What kind of controlling economic power is that? Furthermore, since Goodrich and Firestone are leading nationally advertised brands, one would naturally expect their products to be purchased by large numbers of dealers even without any sales promotion by an oil company supplier.

(3) None of the following key aspects of Atlantic's relationship with its dealers, which the Seventh Circuit regarded as significant (331 F. 2d at 396), were proved or found in *Texaco-Goodrich*: (a) the Eleven Point Lease Letter prescribing operational standards for service stations; (b) the enforcement of such standards by sales personnel and "phantom customer inspectors;" and (c) the warning letters threatening cancellation of the service station lease in 15 days for failure to comply with the Eleven Point Lease Letter.

(4) There were many other facts which the Seventh Circuit relied upon as evidencing Atlantic's controlling economic power over its dealers—none of which were found or proved in *Texaco-Goodrich*. For example:

(a) "To commence the plan, Atlantic gave Goodyear and Firestone the names of its dealers in their

[21] What is more, "there were *no* exclusive [Texaco] dealers in the sense that they confined themselves entirely to sponsored TBA" [I. D., JA 165 (emphasis supplied); see also Rev. I. D., JA 214].

respective territories so that their advertising could be installed at the service stations. Under Atlantic's policy this meant that only Goodyear or Firestone identifications were to be displayed at Atlantic stations. Atlantic salesmen accompanied either by Goodyear or Firestone salesmen contacted the dealers concerning the change-over to sponsored TBA, and Atlantic received progress reports from Goodyear and Firestone. The reports included the names of dealers who refused to permit the installation of Goodyear or Firestone signs" (331 F. 2d at 398).

(b) "Atlantic establishes TBA quotas for its dealers which are considered 'an agreed upon obtainable objective'" (331 F. 2d at 399).

(c) "Atlantic salesmen police dealers' contractual obligations with the oil company by contacting the dealers regularly. . . . [T]hey check the dealer's books to ascertain whether nonsponsored TBA has been purchased" (*Ibid.*).

The marked contrast between Atlantic's relationship with its dealers and Texaco's is patent. As the court below noted, "the examiner found as a fact that Texaco's policy, announced to all its salesmen as long ago as June 1, 1948, is that it has neither the right nor the desire to dictate to the dealer or to influence him in any way as to the type of merchandise he should handle, or the source from which he should purchase it. This finding was adopted by the Commission" (14a). This "announced policy of Texaco to respect the independence of its dealers" was not just a piece of paper; "as the evidence overwhelmingly shows, its practice has followed its policy" (15a).

Petitioner's disagreement with the Court of Appeals' factual assessment of the record appears to stem at least in part from its own misreading of certain documents (Petition, pp. 15-17). Thus, contrary to petitioner's

assumptions: (1) JAX 155 is *not* a lease from Texaco to a service station; (2) Texaco must supply its dealers with their *maximum* (not minimum) requirements of gasoline under the Agreement of Sale; and (3) Texaco does *not* assign TBA quotas to its dealers.[22]

In short, not only is there no conflict between the District of Columbia and the Seventh Circuits on the issue of controlling economic power, but petitioner has done violence to the record in this case.

B. The issue of competitive effects

According to petitioner, "[t]he basic vice of the plan is that it amounts to an illegal tying arrangement under which Texaco requires its dealers, as a condition of maintaining that status, to purchase Goodrich and Firestone TBA" (Petition, pp. 15-16). Proceeding with its *post hoc* tie-in theory, petitioner asserts: "In view of the controlling economic power which Texaco has over its dealers, the Commission was fully warranted in holding that the sales commission plan for distributing TBA through those dealers violates Section 5 of the Federal Trade Commission Act" (*Id.* at 17-18).

Wholly apart from the fact, as we have just seen, that there is no evidential foundation for the assumption of "controlling economic power," a further fatal infirmity of petitioner's argument is that the Commission never found that Texaco had tied its gasoline sales or leases to the purchase of sponsored TBA and never predicated its order against Texaco on any tie-in theory. The agency's theory was the antithesis of the mechanical tie-in rationale. Controlling economic power was not enough. In addition, the

[22] These points, as well as other misstatements in the petition, are developed more fully in Goodrich's Brief in Opposition, pp. 12-14.

Commission deemed it essential to show adverse competitive effects. It was because the record in this case did not contain such a showing that the Commission ordered the remand in 1961. Petitioner cannot now support the Commission's order on a theory not expressed by the Commission. As Mr. Justice White recently put it: "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery*[23] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself. . . . For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168-69 (1962).

Petitioner must live, therefore, with the Commission's proposition that determination of the legality of respondents' sales commission agreement depends upon its competitive effects.[24] And it must face up to the fact that *none* of the competitive effects which the Commission found in the *Atlantic-Goodyear* case were found here. That is precisely why on the very same day that the Commission issued orders against the respondents in the other two TBA cases, it remanded this case to the Examiner for evidence which it regarded as indispensable—but which was never adduced.

The variety of competitive effects—at the manufacturing, wholesale and retail levels—found in the *Atlantic-Goodyear* case (but not here) is reflected in the following quotations from the opinion of the Seventh Circuit:

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[23] *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947).

[24] Respondents, of course, would be free to *support* the judgment below by demonstrating that the Commission's theory of violation is untenable as a matter of law.

1. Division of markets:

"Interbrand competition for the Atlantic service station TBA market is foreclosed to Firestone in Goodyear's territory and Goodyear is foreclosed from selling to the service stations in Firestone's territory." (331 F. 2d at 402).

2. Foreclosure:

"Moreover, the record substantiates the Commission's finding that suppliers of TBA competing with Goodyear and Firestone are substantially foreclosed from selling their products to Atlantic dealers. Atlantic's service station market is fenced off so as to make it unavailable to both manufacturers and wholesalers of competing brands" (*Ibid.*).

3. Favoring supply points:

"Intrabrand competition is perniciously affected. Restraint results inevitably from the designation of a single supply point for TBA sales to the Atlantic dealer. Other Goodyear wholesalers cannot compete with the supply point dealer for the business of the Atlantic service stations in his territory"[25] (*Ibid.*).

4. Full line forcing:

". . . both Goodyear and Firestone said that they would refuse to sell only tires under the sales commission plan and insisted that they be allowed to handle batteries and accessories as well as their own products" (331 F. 2d at 398).

To repeat: not a single one of the foregoing competitive effects was found or proved in the *Texaco-Goodrich* case.

[25] In *Texaco-Goodrich*, there was a specific finding that the Texaco dealer is "free to deal with any Goodrich supply point he may prefer" (Rev. I. D., JA 219).

Since no additional evidence was developed on the remand, this case today stands in the same posture that it did on March 9, 1961. There is no more conflict between the decisions of the Seventh Circuit and the court below than there was between the opinions of the Commission three and a half years ago when the agency issued a cease and desist order against Atlantic and Goodyear and simultaneously refused to issue one against Texaco and Goodrich.

Petitioner cannot be serious in its formulation of the question presented: "Whether it is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a major rubber company and a major oil company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the rubber company's products to the oil company's retail dealers" (Petition, p. 2). Manifestly, there can be no "yes" or "no" to such a question. The answer depends on the facts —the facts of the particular case, not some other case. Otherwise there would be no need for a trial. Nor is there anything anomalous about finding that the conduct of one oil company which is a party to a sales commission agreement with a rubber company amounts to unfair competition, while that of another oil company does not. Surely Texaco should not be prohibited from entering into a sales commission agreement simply because Atlantic may have abused the right. While petitioner chooses repeatedly to characterize Texaco and Atlantic as "major" oil companies, this hardly makes the question of individual "innocence" or "guilt" any less personal. That is why separate hearings were held in the three TBA cases, that is why the Commission ruled that evidence received in one proceeding could not be considered in another, and that presumably is why the Commission has not proceeded against other "major" oil and rubber companies which have sales commission agreements.

When all is said and done, petitioner implicitly recognizes that this is a fact case and that liability cannot be fastened upon Texaco for what Atlantic may have done. By conceding that the Commission's order cannot stand against Texaco because of Chairman Dixon's prejudgment of the issues, petitioner necessarily acknowledges, as Judge Washington pointed out, that "the 'guilt' or 'innocence' of [the] parties depends on certain factual findings which are in dispute" (19a).

It goes without saying that this Court does not grant certiorari to review "decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality,"[26] in the guise of resolving a non-existent conflict between circuits.

Conclusion

The case does not conflict with any decision of any Court of Appeals. Nor does the petition raise any important question of federal law warranting review. It seeks nothing more than a reassessment by this Court of the facts of record to determine whether an experienced Court of Appeals, fully cognizant of the applicable principles of appellate review of agency findings, erred in setting aside the Commission's decision as factually unsupportable.

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[26] *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502 (1951).

Respondent Texaco Inc., therefore, respectfully urges that the petition be denied.

Respectfully submitted,

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